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No. [redacted] 40 October Term, 1931

IN THE

Supreme Court of the United States

BERNARD L. SHAPIRO, PETITIONER,

vs.

HORACE B. WILGUS AND DAVID BACHMAN, RECEIVERS OF MILLER ROBINSON COMPANY, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

No..... OCTOBER TERM, 1931.

BERNARD L. SHAPIRO, Petitioner,

vs.

HORACE B. WILGUS and DAVID BACHMAN, Receivers of MILLER ROBINSON COMPANY, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Bernard L. Shapiro, in support of the petition for a writ of certiorari, to be directed to the United States Circuit Court of Appeals for the Third Circuit, to review a judgment rendered on the 31st day of December, 1931, which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania, entered on March 12th, 1931, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. That Bernard L. Shapiro, the petitioner, held a note of Herbert P. Robinson for $1,000, which matured on December 19, 1930. On January 9, 1931, Robinson organ-

ized Miller Robinson Company under the laws of the State of Delaware; and on the same day conveyed all his assets to the new corporation, which assumed his debts. On January 12, 1931, Robinson applied for an equitable receivership in the United States District Court for the Eastern District of Pennsylvania, against the Delaware corporation, and the Court appointed two receivers on the same day; and the next day discharged one of the receivers and appointed another in his place. The receivers are the respondents in this petition.

2. On January 16, 1931, Shapiro, the petitioner, brought suit against Robinson on his note in the Court of Common Pleas No. 4, of Philadelphia County, and obtained judgment on the note by default on February 4, 1931.

3. On February 26, 1931, Shapiro filed his petition in the United States District Court for leave to issue execution against property in the possession of the receivers, on his judgment obtained in the State Court. This petition stated these facts, and alleged that they constituted fraud on the petitioner as one of Robinson's creditors. Upon this a rule to show cause was granted. The receivers, in their answer, filed at Bar upon the return day of the rule (March 4, 1931) admitted the facts set forth in the petition, denying only the fraudulent intent.

4. The United States District Court, on March 12, 1931, after argument upon petition and answer, denied the petition without filing an opinion. An appeal was taken to the United States Circuit Court of Appeals for the Third Circuit, and the order denying the petition was affirmed by that Court on December 31st, 1931, and a petition for rehearing denied on January 28, 1932.

5. From the schedule of assets and liabilities attached as Exhibit "A" to the Bill of Complaint, praying for the

appointment of receivers, filed by Robinson and a creditor as co-plaintiff, it appears that the assets of this corporation exceeded the liabilities by about $100,000 (Record p. 8); and the Circuit Court of Appeals stated in its opinion that Robinson was solvent at the time of the conveyance and the application for the receivership.

6. The grounds of the opinion of the Circuit Court of Appeals were that Robinson, in order to prevent suits against him and the consequent destruction of his business, had procured the incorporation of a Delaware corporation for the purpose of obtaining a receiver, since, under the law of the State of Pennsylvania, no receiver can be appointed for an individual; and then had transferred all his property to the corporation; the Court believing that he had "thus acted like an honest man in preventing preferences".

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The basis of the petitioner's complaint is fraudulent conveyance predicated on the facts aforesaid. Under the State practice the petitioner had the right to levy on goods held by the corporation as Robinson's assignee, and thus raise the question of fraud, should the corporation claim title to the goods, the question of fraud being then properly determined by a jury under the State practice.

2. The petitioner, therefore, says that by the decree of the District Court refusing permission to execute upon the assets on which levy could be made, he is deprived of his right to have the question of fraud determined by a jury.

3. The petitioner says that the creation of the corporation in Delaware by Robinson, and his application for a receivership for it in the United States District Court, conferred colorable jurisdiction on that Court by reason of

diversity of citizenship, and was, therefore, in violation of Section 37 of the Judicial Code, providing for the dismissal of suits where the parties have been improperly or collusively joined.

4. The petitioner says that the conveyance to the corporation by Robinson of all his assets rendered him insolvent, and was fraudulent at common law in Pennsylvania, and under the Pennsylvania Fraudulent Conveyance Act, which provides that a conveyance made by a person who will thereby render himself insolvent is fraudulent "*without regard to his actual intent*", if made without consideration.

5. The petitioner says that he could have levied against the corporation's assets, thus raising the question of fraud; and that he should be permitted the same action against the receivers' assets, since their title is no higher or better than the title of the corporation.

6. The petitioner says that the practical result of this decision is to permit a solvent individual citizen of Pennsylvania to incorporate in Delaware in order to create diversity of citizenship, and, thereby, colorably confer jurisdiction on a United States Court, and to transfer his assets to the corporation with the conceded intent of getting them out of the reach of his creditors.

7. The petitioner says that in its opinion the Circuit Court of Appeals said that your petitioner "sought to obtain a preference"; whereas a preference, as defined by the Bankruptcy Act, is where the person giving the preference is insolvent, and the preference is given within four months of bankruptcy, both conditions found non-existent by that Court.

8. The petitioner says that this decision of the Circuit Court of Appeals is in conflict with the decisions of the United States Supreme Court, is in conflict with the applicable local decisions of the Pennsylvania law, is untenable and in conflict with the weight of authority, State and Federal and is such a departure from the accepted and usual course of judicial proceeding as to call for the exercise of the power of supervision of the Supreme Court of the United States.

9. The petitioner further says that the decision violates the petitioner's constitutional right to a trial by jury, under the Seventh Amendment to the United States Constitution.

WHEREFORE, Your petitioner respectfully prays:

THAT a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all of the proceedings in the cause, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief as to this Court may seem proper and be in conformity with the law.

And your petitioner will ever pray.

BERNARD L. SHAPIRO,
By: JACOB WEINSTEIN,
FRANCIS BIDDLE,
Attorneys for Petitioner.

State of Pennsylvania,
County of Philadelphia. } ss.:

FRANCIS BIDDLE, being duly sworn according to law, deposes and says that he is of counsel for the above named Petitioner, that he prepared the foregoing Petition, and that the allegations contained therein are true to the best of his knowledge, information and belief.

(Signed) Francis Biddle

Sworn to and subscribed before me this 12th day of April, 1932.

Helen G. Gehl
Notary Public
My Commission Expires Jan 6, 1935

BRIEF IN SUPPORT OF THE PETITION.

I.

THE OPINIONS OF THE COURTS BELOW.

a. The District Court of the United States for the Eastern District of Pennsylvania, in which this cause originated filed no opinion.

b. The Circuit Court of Appeals for the Third Circuit filed an opinion on December 31, 1931. As this brief goes to press it is still unreported.

It is printed in the record at p. 33.

II.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to Sec. 240 of the Judicial Code as amended by 43 Stat. at Large, 938 Sec. 1 (February 13, 1925).

28 U. S. C. A., Sec. 347

and

30 Stat. at Large, 553 C. 541, Sec. 25 (July 1, 1898) and 43 Stat. at Large, 936, 941, C. 229, Sec. 1, Sec. 13, clause (C).

11 U. S. C. A., Sec. 48.

(By reason of the holding of the Circuit Court of Appeals touching the matter of illegal preference, first introduced by that Court.)

III.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Third Circuit erred in affirming the order of the United States District Court for the Eastern District of Pennsylvania denying the petitioner's prayer for leave to issue execution.

IV.

STATEMENT OF THE CASE.

Bernard L. Shapiro, the petitioner, held a note of Herbert P. Robinson for $1,000, which matured on December 19, 1930. On January 9, 1931, Robinson organized Miller Robinson Company in Delaware; on the same day conveyed all his assets to it, the corporation assuming his debts; and three days later, as holder of 99% of its stock, applied, with a creditor, for an equitable receivership, the corporation, in its answer, joining in the prayer of the bill. The same day the United States District Court appointed Coulbourn and Bachman receivers; and on the next day Coulbourn was discharged and Wilgus appointed in his place. On January 16, 1931, the petitioner brought suit on his note in a State Court, obtained judgment by default against Robinson on February 4, 1931; and thereupon filed his petition against the receivers as respondents, in the

District Court, for leave to issue execution on the judgment obtained in the State Court, against property held by the receivers. The District Court denied the petition, without filing an opinion; and on appeal, the Circuit Court of Appeals affirmed this order. Robinson, the Court said, though solvent, in order to prevent "threatened suits and the consequent destruction of his business", since "under the State law, a receiver cannot be appointed for an individual," had "procured the incorporation of the Delaware company, and in consideration of the issue to him of all its capital stock transferred to it all his property," the company assuming his debts; and had thus acted like an honest man in preventing preferences.

V.

ARGUMENT.

(1.) THE PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO A JURY TRIAL IN THE STATE COURT.

There are no facts in controversy, except that the petitioner says that the whole transaction is a fraud on creditors and the receivers deny fraud. Since the District Court filed no opinion, it is impossible to know the basis of its decision (1). But the Circuit Court of Appeals missed the substance of the error. Shapiro was not asking the Court to find fraud, but to permit him to have that question tested by a jury, a right to which he was entitled under State practice and in the State Court. Unhampered by the receivership he would have issued his writ of *fieri facias*, against the personal property; the corporation would have made a property claim; and the question of fraud (not of

(1) This is a real hardship on petitioner, especially in equity, where matters of fact are found: Virginian Railway Company vs. U. S., 272 U. S. 675 (1926); and constitutes error; Railroad Commission vs. Maxcy, 281 U. S. 82 (1930).

honorable motive, but of *legal fraud* on creditors) would have been submitted to a jury. *Handel, etc., Building and Loan Association vs. Elleford,* 258 Pa. 143 (1917); and *American Trust Co. vs. Kaufman,* 276 Pa. 35 (1923).

In the latter case the Court said (p. 39):

> "A conveyance of property made by a debtor to defraud creditors is void as to them * * * and the title for the purpose of enabling creditors to enforce their debts remains in the grantor * * * A judgment creditor is allowed to levy upon and sell any title * * * alleged to be in the grantor * * *"

And the United States Supreme Court has held that where the issue is fraudulent conveyance, the litigant has a constitutional right to a jury trial and cannot be deprived of that right in a Federal Court under the seventh amendment of the Federal Constitution, under a State statute, by the use of a bill in equity, seeking to set aside the conveyance, and to subject the property to the payment of debts. *Scott vs. Neely,* 140 U. S. 106 (1890) (1)

(2.) COLLUSIVE JURISDICTION.

As the Circuit Court of Appeals pointed out, Robinson could not have obtained a receiver for himself in any State Court (1), and in that status the District Court had no jurisdiction in the matter. He, therefore, caused the creation

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(1) And, more recently, in Ex parte Skinner & Eddy Corporation, 235 U. S. 96 (1923).

To say that concurrent jurisdiction, where conferred by State practice, exists in equity, does not mean that petitioner must submit himself to equity. The choice is his. Twist vs. Prairie Oil Co., 274 U. S. 684, 689 (1927). And if his right is to a jury trial, in a suit at common law, how can this right be impaired, by this device of his debtor, under the provisions of the Seventh Amendment?

(1) Hogsett vs. Thompson, 258 Pa. 85 (1917).

of a corporation to escape the consequence of the local law; and its organization to confer jurisdiction, on the ground of diversity of citizenship, in a Federal Court. This is a violation of Section 37 of the Judicial Code, (2) which provides for the dismissal of a case where "*the parties * * * have been improperly or collusively made or joined* * * for the purpose of creating a case cognizable * * * under this chapter * * *.*"

In *Miller & Lux v. East Side Canal Co.*, 211 U. S. 293 (1908), a California corporation instituted a bill in equity in a Court of that state against another California corporation, and thereafter caused the organization of a Nevada corporation, taking all of its stock, and conveying all its property to the new corporation. The suit in the State Court was discontinued, and a bill filed by the Nevada corporation in the United States Court, jurisdiction being obtained by the diversity of citizenship thus created. The Supreme Court held that the action was collusive, under the Statute, to "invoke the jurisdiction of the Federal Court and avoid the determination of the rights of the parties in the Courts of the State (p. 304);" and affirmed a decree dismissing the bill.

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(2) Judicial Code, Section 37 (28 USCA, Sec. 80):

"If in any suit commenced in a District Court, or removed from a State Court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed as justice may require, and shall make such order as to costs as shall be just."

(3.) THE CONVEYANCE WAS FRAUDULENT UNDER THE UNIFORM FRAUDULENT CONVEYANCE ACT OF PENNSYLVANIA AND UNDER 13 ELIZABETH IN FORCE IN THAT STATE.

The Uniform Fraudulent Conveyance Act provides (1):

> "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors, *without regard to his actual intent*, if the conveyance is made or the obligation is incurred without a fair consideration."

Robinson conveyed all his assets to the corporation, thereby rendering himself insolvent, though he was amply solvent before, for nothing except the technical consideration of the corporation's stock. The stock was not a "fair consideration". His assets were $274,315.82, his liabilities only $175,746.59 (Record, pp. 8, 9); so that, as the Circuit Court of Appeals pointed out, "he was solvent to the extent of a hundred thousand dollars" (Record, p. 34). But after the conveyance he had nothing.

And whatever his motive was, his intent, even if, in view of this act, such intent were in any way relevant, was to withdraw all he had from the reach of his creditors. Therefore that the Court considered his action not only honest but praiseworthy, is perhaps interesting, but hardly relevant. Whether for their best interests or not Robinson defrauded his creditors; doubtless from the most scrupulous of motives, but hardly under the sanction of law; and the denial of fraud is, after all, "equivalent to nothing more than a denial of a conclusion of law (1)." For fraud here

(1) Act of May 21, 1921, P. L. 1045, Sec. 4, Purdon's Penna. Stat. Ann., Title 39, Section 354, P. 257).

(1) Lathrop vs. Drake, 91 U. S. 516, 520 (1875).

is a conclusion of law made inevitably applicable by the admitted facts.

Under 13 Eliz. part of the common law of Pennsylvania, *an intent to delay creditors is fraud.* The Supreme Court of Pennsylvania has said: "The consideration of a sale may amount to the value of the land sold, and yet the sale be fraudulent as against creditors, because such sale may delay, hinder, and obstruct them in the collection of their debts. Such a sale for value may not only delay and hinder them but may also be made for that very purpose and intent * * * It is the intent that gives character to the transaction; and when the act corresponds with the intent, and both concur in delaying and hindering creditors, the deed is void (2).

And again: "The Statute of 13 Eliz. being directed against conveyances that *hinder and delay* (the italics are the court's) creditors, * * * bargains which * * * tie up property out of reach of creditors, preventing the collection of their debts in the ordinary course of law, are held to be against the Statute, and fraudulent in law (1)". An illustration of this is a judgment confessed for an honest debt, but given to force other creditors to compromise, which is fraud on them (2).

That fraud exists under these circumstances has been squarely decided by the Circuit Court of Appeals for the Second Circuit, on facts almost identical with ours. *In re: American Candy Mfg. Co.* (3) a corporation conveyed all its assets to another corporation, the latter assuming its debts, the former thus becoming insolvent. Bankruptcy of the second corporation followed; and a creditor, who had

(2) Zerbe v. Miller, 16 Pa. 488, 497 (1851).
(1) Hennen v. McClane, 88 Pa. 219 (1878).
(2) Bunn, Raiguel & Co. v. Ahl, 29 Pa. 387 (1857).
(3) 256 F. 87 (1919).

obtained his judgment after the conveyance, petitioned to set aside sufficient of the bankrupt's property to pay his debt. All the other creditors had filed claims against the bankrupt, and had not joined in the petition. Judge Hough held the conveyance fraudulent, and granted the relief prayed for, pointing out that the petitioner might have levied an attachment on the property fraudulently conveyed. And Judge Hand, in a similar case (4), pointed out that an intent to delay will defeat such a conveyance as effectively as an intent to defraud; and that no consideration will support a fraudulent conveyance. The cases are under a New York Statute, but express the universal common law principle.

And upon like facts the Law of Pennsylvania is the same (1).

(4.) THAT THE RECEIVER NOW HAS THE PROPERTY SHOULD NOT PREVENT THE COURT FROM PERMITTING A LEVY ON IT, IN THE USUAL WAY, TO DETERMINE THE FRAUD.

The Receiver's title, of course, adds nothing to the corporation's title (2). We attack not the receivers' appointment, but their title to the property. If execution could have issued against the property, while held by the corporation, before the receivership, and the question of fraud tested by a property claim, under both State and Federal practice in this District, how can the Court prevent the petitioner's testing *the question of fraud*, against the receivers,

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(4) **Empire Lighting Fixture Co. v. Practical Lighting Fixture Co.**, 20 F. (2d) 295 (1927).

(1) **Montgomery Web Co. v. Dieselt.** 133 Pa. 585 (1890). **Atlas Portland Cement Co. v. Brick Co.**, 280 Pa. 449 (1924).

(2) **Fosdick v. Schall**, 99 U. S. 251 (1878): "The possession taken by the receiver * * * adds nothing to the previously existing title * * *." **In re American Candy Mfg. Co.**, cited **supra**, p. 89: "The trustee in bankruptcy stands in the shoes of the (bankrupt which) * * * took nothing by the conveyance, except what remained after accounting to non-consenting creditors."

in the same way? If there is fraud the receivers cannot hold the property; and that they now hold them as officers of the Court cannot cure such a defect in their title. The District Court has denied the right of the petitioner to have a jury trial to test the question of fraud; his right to a court's judgment on this issue; and his resultant right to satisfy his judgment out of the property now held by the receivers, to the extent necessary to liquidate his judgment, without hardship to other creditors, since the Circuit Court of Appeals has found that *the debtor was solvent.* For "a fraudulent conveyance passes no title to the grantee (and hence to the receiver) as against the creditor offended (1)".

The Circuit Court of Appeals defends Robinson's actions on the ground that they were taken "to prevent the sacrifice of his business, to prevent the *preference* of the threatening creditors, and to conserve the large equity of his creditors an himself in his property"; and speaks again of Robinson's thwarting a *preference;* and that only two creditors (one of them the petitioner) *"sought preferences"* (italics ours). But the use of the word is as invidious as it is inexact. The only preference in a legal sense is one obtained *during insolvency* and prior to bankruptcy. The Bankruptcy Act provides that a "person shall be deemed to have given a preference, if, *being insolvent,* he has, within four months before the filing of the petition, procured or suffered a judgment to be entered against himself in favor of any person (2)." Robinson was neither insolvent nor bankrupt. The petitioner therefore has a right to protect his own claim by suit, and if he gains an advantage, no one can object.

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(1) **Chandler v. Van Reeder, 24 How. 227 (1860).**

(2) **July 1, 1898, C. 541, Sec. 60, as amended 11 U. S. C. A. Sec 96, May 27, 1926, C. 406, Sec. 1. See also Sec. 3, 30 Stat. 546 of the Act July 1, 1898, as amended 11 U. S. C. A. Sec. 21.**

The Supreme Court of the United States has said:

> "It is not to be disputed that, except as forbidden by bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests (3)."

VI.

CONCLUSION.

The extraordinary principles, established by this case, are:

(1) A solvent individual citizen of Pennsylvania may incorporate himself in Delaware in order to create diversity of citizenship in a United States District Court for the purpose of giving collusive jurisdiction to that Court to appoint a receiver, which result he could not have obtained in the State Court.

(2) A solvent individual may transfer all his goods to a corporation with the avowed intent of getting them out of reach of his creditors; and yet this is not fraud, nor evidence of fraud sufficient to be submitted to a jury.

This judgment is in conflict with the decisions of the Supreme Court of Pennsylvania and the decisions of the Supreme Court of the United States; and in conflict with the general weight of authority as hereinbefore indicated.

Respectfully submitted,

JACOB WEINSTEIN,
FRANCIS BIDDLE,
Attorneys for Petitioner.

April 12, 1932.

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(3) Blennerhassett v. Sherman, 105 U. S. 100, 117 (1881).